

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Commission Review and
Investigation of Qwest's Unbundled Network
Elements UNE Prices

ISSUE DATE: January 13, 2004

DOCKET NOS. P-421/CI-01-1375
P-442,3012,421/M-01-1916

ORDER AFTER RECONSIDERATION,
MODIFYING SEPTEMBER 11, 2003 ORDER

PROCEDURAL HISTORY

On September 11, 2003, the Commission issued its ORDER ADOPTING ALJ REPORTS, REQUIRING CUSTOMIZED ROUTING AND BULK DOWNLOAD, ESTABLISHING RATES, AND REQUIRING RATE SCHEDULES. Among other things, the Order adopted the ALJs' May 10, 2002 Report in Docket No. P-421/CI-01-1370 and the ALJ's February 28, 2003 Report in Docket No. P-421/CI-01-1375 as modified, required Qwest to continue to price OS/DA as an unbundled network element and to provide customized routing service, adopted rates for Operator Services (OS) and Directory Assistance (DA) as recommended by the Administrative Law Judge (ALJ), and required Qwest to provide access to the ICNAM database via electronic bulk download at the rates recommended by the ALJ and Qwest.

On September 22, 2003, Qwest filed a Motion for Reconsideration of the Commission's September 11, 2003 Order.

On October 10, 2003, MCI WorldCom Communications, Inc. (MCI) and the Minnesota Department of Commerce filed responses to Qwest's motion.

The Commission met on December 4, 2003 to consider this matter.

FINDINGS AND CONCLUSIONS

I. SUMMARY OF QWEST'S OBJECTIONS

In its Motion for Reconsideration, Qwest objected primarily to two provisions of the Commission's September 11, 2003 Order: 1) the requirement that Qwest provide access to its

InterNetwork Calling Name (CNAM) database via a bulk download; and 2) the requirement that Qwest provide access to operator services and directory assistance (OS/DA) at the TELRIC¹ [total element long-run incremental cost] rates recommended by the Administrative Law Judge.

In addition, Qwest objected to the Commission imposing customized routing obligations beyond what federal law requires. Qwest argued that the Federal Communications Commission (FCC) has found Qwest has met the federal requirements for customized routing.

II. CNAM ISSUE

A. Qwest's Position

Qwest asserted that the FCC in its Triennial Review Order² made two dispositive determinations that warrant the Commission vacating its September 11, 2003 Order regarding CNAM.

First, Qwest stated that the FCC determined that competitive local exchange carriers (CLECs) that deploy their own switches are not “impaired” under Section 251(d)(2) of the Telecommunications Act of 1996. Qwest argued that this determination relieves incumbent local exchange carriers (LECs) of any obligation under Section 251(c)(3) to provide access to CNAM databases where the CLEC has deployed its own switch or is not entitled to access unbundled switching.

Second, Qwest stated that the FCC expressly rejected WorldCom’s efforts to redefine access to the CNAM databases to require bulk access to CNAM database information in those limited circumstances where CLECs can obtain unbundled access to the database.

Qwest also argued that since the FCC has stated that its findings in the Triennial Review Order apply nationwide, the Minnesota Commission has no authority to order bulk download of CNAM under state law. Qwest stated that the Triennial Review Order sends a clear message that state efforts at variance with its order are preempted. Qwest concluded that the Commission should grant Qwest’s motion regarding CNAM to avoid an irreconcilable conflict with the FCC’s Triennial Review Order, the Telecommunications Act of 1996, FCC regulations, and the Supremacy Clause of the Constitution.

¹ The definition of TELRIC is set forth at 47 C.F.R. § 51.505(b).

² See *In the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, CC Docket Nos. 01-338, 96-98, 98147, FCC 03-36 (rel. August 21, 2003) REPORT AND ORDER AND ORDER ON REMAND AND FURTHER NOTICE OF PROPOSED RULEMAKING (Triennial Review Order). The FCC’s Triennial Review Order was released after the Commission deliberated the issues that Qwest has requested the Commission to reconsider.

B. MCI's Opposition to the Motion for Reconsideration

MCI disputed Qwest's assertion that the Triennial Review Order establishes that CLECs are not entitled to bulk download of CNAM. MCI stated that the FCC's conclusion was much narrower than Qwest claimed. MCI stated that the Triennial Review Order had analyzed and rejected the CLECs' claim to be entitled to bulk download of CNAM pursuant to Section 251(c)(1), the impairment section, only.

MCI acknowledged that the FCC found that a CLEC's non-access to the CNAM database by bulk download did not "impair" the CLEC's ability to provide the services that it seeks to offer [the standard established in Section 251(d)(2)]. MCI states, however, that the FCC also made it clear that it was not ruling on the dialing parity/nondiscrimination requirements of Section 251(b)(3). MCI stated that the FCC still made clear that bulk download of the CNAM database was required under Section 251(b)(3) when the lack of such access would not provide CLECs with the dialing parity to which they are entitled under Section 251(b)(3).

MCI stated that the Administrative Law Judge (ALJ) and the Commission have correctly concluded that limiting CLECs to per-query access to the CNAM database is discriminatory because per-query access is inferior to the access that Qwest provides itself. MCI stated that the Triennial Review Order's impairment analysis pursuant to Section 251(d)(2) does nothing to alter the conclusion that Section 251(b)(3) requires that the entire CNAM database must be made available on a bulk download basis.

C. The Department's Position Regarding the CNAM Database Issue

The Department recommended that the Commission maintain its decision to require bulk downloads of the CNAM to CLECs. The Department stated the FCC's finding that access to the CNAM by bulk download is not needed to prevent impairment under Section 251(d)(2) does not mean that the Commission is prohibited from requiring CLEC bulk access to the CNAM, either under a Section 251(b)(3) dialing parity analysis or pursuant to state law anti-discrimination provisions.

The Department noted that in its September 11, 2003 Order the Commission found that Qwest's refusal to provide access to the CNAM database by bulk download was discriminatory and anti-competitive in violation of Minnesota laws. The Department stated that the Commission's finding was sufficient support for its decision to require Qwest to make CNAM available to CLECs via bulk download. The Department stated that Qwest had not submitted any information that refutes the Commission's finding of discriminatory access.

D. Commission Analysis and Action

The Commission has reconsidered its September 11, 2003 Order in light of the FCC's Triennial Review Order regarding CNAM, as requested by Qwest, and finds that nothing in the Triennial Review Order warrants altering the Commission's decision to require Qwest to make its CNAM database available to CLECs by bulk download.

First, contrary to Qwest's assertion, the FCC clearly did not intend its finding of "no impairment" under Section 251(d)(2)(B) to be interpreted as a finding that Qwest's denying CLECs access to the CNAM via bulk download did not violate the dialing parity requirements of Section 251(b)(3).³ In its Triennial Review Order, the FCC focused solely on the "no impairment" requirements of Section 251(d)(2) and specifically left open the question whether the CLECs' access to the CNAM database via bulk download was required by Section(b)(3). The FCC stated:

We conclude that this issue [the CLECs' claim that they should be able to access the CNAM database via batch download] is more properly addressed pursuant to the dialing parity requirements under section 251(b)(3).

Based on the record established in this proceeding, the ALJ has found and the Commission has confirmed that the per query access to the CNAM offered the CLECs by Qwest is significantly inferior to the access that Qwest has to the CNAM database and that, as a consequence, Qwest is not providing CLECs with nondiscriminatory dialing parity as required by Section 251(b)(3).⁴ The Commission's directive that Qwest provide CLECs' access to the CNAM via bulk download, therefore, is appropriate as a matter of fact and federal law.

Second, the FCC's Triennial Review Order does not, as Qwest has contended, preempt the Commission from applying the provisions of Minnesota law which prohibit LECs from discriminatory and anti-competitive action against CLECs.⁵ Qwest contended that states are precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in the Triennial Review Order. As noted previously, however, the FCC clearly states that its Order does not preclude analysis of the CLECs claim to be entitled to bulk download access to the CNAM under the nondiscriminatory dialing parity provisions of Section 251(b)(3).

³ Section 251(b)(3) of the Telecommunications Act of 1996 states that the obligations of all local exchange carriers include "[t]he duty to provide **dialing parity** to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have **nondiscriminatory access** to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." Emphasis added.

⁴ The ALJ's finding is found *In the Matter of a Commission Investigation into Qwest's Compliance With Section 271(c)(2)(B) of the Telecommunications Act of 1996, Checklist Items 3,7,8,9,10 and 12, Findings of Fact, Conclusions of Law, and Recommendations*, Docket No. P-421/CI-02-1370 (May 8, 2002) at ¶ 152. The Commission's adopted the ALJ's Report and made a specific similar finding. See *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Element Prices, ORDER ADOPTING ALJ REPORTS, REQUIRING CUSTOMIZED ROUTING AND BULK DOWNLOAD, ESTABLISHING RATES, AND REQUIRING RATE SCHEDULES*, Docket No. P-421/CI-01-1375 (September 11, 2003) at page 15.

⁵ Minn. Stats. §§ 237.60, subd. 3; 237.74, subd. 2; and 237.121.subd.5.

The FCC did not find, as Qwest would have it find, that the “no impairment” provisions of Section 251(d)(2) supercede and render null the potency of Section 251(b)(3) to redress the nondiscriminatory, dialing parity concerns which are the subject of that section. Since the Triennial Review Order recognized the independent viability of Section 251(b)(3) and did not establish a federal regime with respect to nondiscriminatory dialing parity, the Commission’s Order requiring Qwest to provide nondiscriminatory dialing parity does not thwart or frustrate a federal regime adopted by the FCC in the Triennial Review Order.

III. OS/DA ISSUE

A. Qwest’s Position on OS/DA

Qwest stated that the Commission should reconsider its determination in the September 11, 2003 Order that Qwest must provide OS/DA at cost-based (TELRIC) rates.

Qwest argued that the FCC’s *Triennial Review Order*⁶ renewed the national determination made earlier by the FCC in the *UNE Remand Order* that CLECs are not entitled to access OS/DA on an unbundled basis (hence at TELRIC rates) because OS/DA is available to CLECs from a variety of competitive sources.

Qwest also asserted that the *Qwest 9-State Order*⁷, which granted Qwest authority under Section 271 to provide long distance service in the nine-state area, determined that the customized routing offered by Qwest meets all its obligations under FCC rules with respect to customized routing and that, therefore, the Commission’s additional customized routing obligations conflict with the FCC determination and are preempted.

B. MCI’s Comments

MCI asserted that Qwest mischaracterized the FCC’s conclusions by failing to acknowledge that the FCC, both in the *UNE Remand Order* and in the *Triennial Review Order*, limited the finding that ILECs are not required to provide OS/DA as UNEs to instances where the ILEC provides custom routing to enable CLECs to either self provision OS/DA or purchase the OS/DA service from an alternative provider.

MCI also argued that there is no merit to Qwest’s claim that the FCC’s grant of Section 271 approval compels a conclusion that Qwest’s custom routing is sufficient to relieve Qwest of its obligations to provide OS/DA at cost-based-rates. MCI argued that the FCC has acknowledged in

⁶ Supra at ¶¶ 656 and 659.

⁷ Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, CC Docket No. 02-314, 17 FCC Rcd 26303 ¶ 373.

the Triennial Review Order the limited scope of its review under Section 271. To illustrate the FCC's understanding that the scope of its 271 review is limited, MCI cited the FCC's rejection of ILEC arguments that Section 271 approvals demonstrated the adequacy of Qwest's existing migration processes.⁸

In MCI's view, therefore, the ALJ's finding that Qwest's custom routing was inadequate⁹ did not conflict with the FCC's decision to grant Qwest authority to provide in-region, interLATA service because the FCC's decision cannot be seen as determining that Qwest is providing adequate customer routing.

C. The Department's Comments Regarding OS/DA

The Department argued that the Commission should not amend its Order with respect to custom routing because the Triennial Review Order does not modify the requirement that LECs provide adequate customized routing. In support of this position, the Department cited Paragraph 560 of the Triennial Review Order:

[F]or the same reasons in the UNE Remand Order, we find that in order to ensure that competitive carriers have access to OS/DA, in those circumstances where switching is unbundled, we require incumbent LECs to provide unbundled access to competitive carriers purchasing the switching UNE, if the incumbent LEC does not provide customized routing necessary to use alternative providers.¹⁰

The Department also noted that the FCC's revised rules promulgated by the FCC in conjunction with the Triennial Review Order contain a similar requirement.¹¹

The Department, however, did recommend that the Commission modify its Order with respect to the scope of CLECs to whom Qwest should be required to provide OS/DA at cost-based (TELRIC) rates. The Department noted that the Commission's Order requires Qwest to provide OS/DA as a UNE (hence at cost-based rates) to any and all requesting CLECs. The Department stated that under the Triennial Review Order, OS/DA is available at TELRIC rates only to carriers that may purchase unbundled switching as a UNE. The Department recommended that the Commission modify its Order accordingly.

⁸ Triennial Review Order at ¶ 469.

⁹ ALJ's Report and Recommendation Regarding Non-OSS Issues, at ¶ 103.

¹⁰ Triennial Review Order at ¶ 560. The paragraph contains footnote 1735, in which the FCC clarifies that customized routing "must be provided in a manner that allows competitive LECs to efficiently access either a third party's OS/DA platform or their own OS/DA platform."

¹¹ Triennial Review Order, Appendix B, Revised Rules 51.319(d)(4)(ii).

D. Commission Analysis and Action

After reconsidering the September 11, 2003 Order as requested by Qwest, the Commission finds no basis for changing its basic decision regarding OS/DA. Qwest has characterized the FCC approval of the Company's 271 petition as a preemptive shield that prevents this Commission from finding that the Company's custom routing is inadequate and hence that the Company must offer OS/DA as UNES at cost-based rates.

The Commission does not agree with Qwest that the FCC's approval of the Company's 271 Application means the FCC has found that the customized routing it offers is adequate to relieve it of the responsibility to offer OS/DA at cost-based rates. While such a finding by the FCC would preempt the Commission from making a finding to the contrary, nowhere does the FCC explicitly make such a finding, and Qwest's suggestion that this is implied by the FCC's decision is not persuasive.

As MCI argued, the FCC recognized in its Triennial Review Order a difference between findings that service is adequate for 271 purposes and a finding that such service is adequate in all contexts. In addition, subsequent to approving Qwest's 271 petition and many other 271 applications, the FCC has clarified that where switching is unbundled, ILECs must provide unbundled access (hence at cost based rates) to competitive carriers purchasing the switching UNE unless the ILEC provides customized routing that allows competitive LECs to efficiently access either a third party's OS/DA platform or their own OS/DA platform.¹² At no point has the FCC indicated that its approval of 271 applications would automatically substitute for or preempt state inquiry into the adequacy of the ILECs' customized routing.

Qwest has overstated the preemption issue in this instance, claiming preemption where none exists. The FCC's Triennial Review Order states the relevant standard for preemption as follows:

The Eighth Circuit . . . interpreted section 251(d)(3) as a further constraint on Commission [FCC] authority. *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806. The Commission did not appeal the Eighth Circuit's holding with respect to section 251(d)(3). That portion of the Eighth Circuit's opinion reinforces the language of the section, i.e. that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3). *Id.*¹³

Since the FCC has established no federal regime with respect to custom routing that would be interfered with by a state assessing the adequacy of Qwest's custom routing and since the Commission's soundly fact-based assessment of the inadequacy of Qwest's custom routing clearly does not "substantially prevent" the implementation of any such regime, no preemption exists.

¹² Triennial Review Order ¶ 560 at footnote 1735.

¹³ Triennial Review Order ¶ 192 at footnote 611.

Therefore, since the ALJ's finding adopted by the Commission that Qwest's customized routing is inadequate is well-founded,¹⁴ the Commission will not modify its requirement that Qwest make OS/DA available at TELRIC rates.

Regarding the scope of the requirement that Qwest provide OS/DA at cost-based (TELRIC) rates, however, the Commission agrees with the Department that the FCC's Triennial Review Order makes it clear that OS/DA is to be made available at TELRIC rates only to carriers that may purchase unbundled switching as a UNE.¹⁵ The September 11, 2003 Order will be amended to so indicate.

ORDER

1. After reconsidering the September 11, 2003 Order, the Commission finds that only one change is warranted. The Commission's September 11, 2003 Order at page 18, paragraph 2 is hereby amended to require that OS/DA must be made available at TELRIC rates only to carriers for whom local switching is available as a UNE.
2. In all other respects, the September 11, 2003 Order remains unchanged.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice) or 1-800-627-3529 (TTY relay service).

¹⁴ See September 11, 2003 Order at pages 5-10.

¹⁵ See Triennial Review Order at ¶ 560.